U.S. Department of Labor

Assistant Secretary for
Employment and Training
Washington, D.C. 20210

SEP 12 2002

The Honorable Benjamin J. Cayetano
Governor of Hawaii
Honolulu, Hawaii 96813

Dear Governor Cayetano:

This is in reference to my May 13, 2002, letter concerning your request for waivers of various statutory and regulatory requirements under the Workforce Investment Act (WIA) pursuant to the Secretary's authority to waive certain requirements of WIA Title I, subtitles B and E and sections 8-10 of the Wagner-Peyser Act. This authority is granted to the Secretary by section 189(i)(4)(A) of the Workforce Investment Act (WIA or the Act), and in the implementing regulations at 20 CFR 661.420.

My previous letter indicated that we were deferring a decision on the state's request to waive the WIA provisions pertaining to state verification of local-level performance for applicants to be included on the state Eligible Training Provider List (ETPL) pending further review. I am pleased to inform you that we have completed our review and are able to respond favorably to the state's request. The following is our determination and disposition of the state's request.

Waiver Request: Eligible Training Provider (ETP) Requirements; Local Identification (WIA Sec. 122(e)(2) and (3) and 20 CFR 663.535(g))

The state's request (copy enclosed) asked to waive the need for the designated state agency, the agency responsible for section 122 requirements, to double-check the review by the local agencies of the performance levels of providers on the list provided to the state. Specifically, at WIA section 122(e)(2), the state asked that we waive the language providing: "If the agency determines, within 30 days after the date of the submission, that the provider does not meet the performance levels described in subsection (c)(6) for the program (where applicable), the agency may remove the provider from the list for the program. The agency may not remove from the list an agency submitting an application under subsection (b)(1)." Also, at Section 122 (e)(3), the state asked that we waive the language providing: "and is not removed by the designated State agency under paragraph (2)." The state's request appears to meet the standard for waiver of requirements relating to key reform principles, as specified at 20 CFR 661.410(c).

The state reports that under the current state requirements, the Local Workforce Investment Boards solicit, review, and approve training providers' applications for WIA eligibility. Then, the information is transmitted to the state Department of Labor and

Industrial Relations (DLIR) for it to determine if the training provider meets the performance levels. The state indicates that from its experience, the state's review is duplicative and only serves to delay the approval process.

At the time that we initially processed this request, our inclination was to grant the state's request. However, questions were raised about whether or not verification of local performance for all provider applicants was required to be performed by the state. Although it could be implied, it was not clear that the statute or regulations mandated that the state double check the performance submitted by the local boards, in order to establish subsequent eligibility of providers, for inclusion on the state Employment and Training Provider List (ETPL). We, therefore, recommended deferred action on the state's request to fully review policy issues regarding strategic planning guidance and plan modification issues.

Part of our reconsideration revealed that the issue of state-level verification of local-level performance of provider applicants was to be addressed in the final WIA regulations. The preamble accompanying the Final Rules enumerated and reconciled comments received on the Interim Final Rules, including regulatory changes in the final rules resulting from the comment process, one of which bears directly on the State of Hawaii's request.

Although the Final Rules reinforced the role of the state agency in verifying performance, based on the state's authority to enforce the provisions of section 122(f)(1), concerning intentional submission of inaccurate performance information, the Rules also provided some flexibility in how verification could be accomplished. In relevant part, the preamble states at 65 Fed. Reg. 49339, in column 1, (copy enclosed) published in the Federal Register on August 11, 2000, that:

> "In addition, since State agency consultation with the Local Board is required under section 122(f)(1) and verifiable information is required to be submitted by the Local Board, we believe that the Act also provides implicit authority to Local Boards to verify performance information and to report suspected inaccuracies to the State agency. *We have added language in a new paragraph 663.510(e)(4) to clarify that Local Boards may perform verification of performance information, under the Governor's procedures* (Emphasis added.). . . . . We agree that the roles of the State agency and Local Boards may overlap in determining if programs meet performance levels and verifying performance information, and we encourage States and Local Boards to work toward eliminating needless duplication."

While the regulations were clearly intended to be revised, the proposed new paragraph addition does not appear in the Final Rules.

Although it is not clear that a waiver is necessary, granting a waiver to permit the state to do what the intended revised regulations would have more clearly allowed seems

appropriate and would clear up any confusion about performance verification for local providers for the state. Accordingly, the state's waiver request is granted with the recommendation that the state have in place as part of its procedures a process to ascertain the validity of eligible training provider program applications. Such a process should include a quick assessment resulting in a determination as to whether or not a subsequent review is necessary, and a follow up plan for any subsequent reviews as the state may deem appropriate. Specifically, under this waiver we will interpret WIA sections 122(e)(2) and (e)(3) as not requiring the state agency to perform a duplicative review of the performance of local area ETP applicants.

The granted waiver is incorporated by reference into the state's WIA Grant Agreement, as provided for under paragraph 3 of the executed Agreement, and also constitutes a modification of Hawaii's approved five-year Strategic Plan. A copy of this letter should be filed with the state's WIA Grant Agreement and the state's approved five-year Plan, as appropriate.

In response to the issue raised by the state, we plan to provide guidance to the WIA system clarifying the change intended in the Final Rule. Thank you for bringing this matter to our attention.

We look forward to enabling you to achieve better workforce development outcomes and improve the lives of many Hawaii residents. We are prepared to entertain other state and local-level waiver requests that Hawaii may wish to submit, consistent with the provisions of the Act and regulations.

Sincerely,

Emily Stover DeRocco

Enclosures

U.S. Department of Labor

Assistant Secretary for
Employment and Training
Washington, D.C. 20210

MAY 13 2002

The Honorable Benjamin J. Cayetano
Governor of Hawaii
Honolulu, Hawaii 96813

Dear Governor Cayetano:

It is with pleasure that I respond to your request for waivers of various statutory and regulatory requirements under the Workforce Investment Act (WIA) pursuant to the Secretary's authority to waive certain requirements of WIA Title I, ~~subtitles~~ B ~~and~~ E ~~and~~ sections 8-10 of the Wagner-Peyser Act. This authority is granted to the Secretary by section 189(i)(4)(A) of the Workforce Investment Act (WIA or the Act), and in the implementing regulations at 20 CFR 661.420.

These waivers grant states flexibility in program design for seamless program delivery and improved customer service, in exchange for accountability and agreed-to programmatic outcomes. We hope that these changes will assist your state in meeting its workforce needs and improving programmatic outcomes statewide and at the local level.

We appreciate the state's cooperation in working with our San Francisco Regional Office to provide supplemental information on the waiver submissions, so that an informed decision could be made on the state's requests. After discussions with state staff and review of the additional information provided by the Hawaii Department of Labor and Industrial Relations (DLIR) with regard to the initial requests for waivers, we are pleased to be able to respond positively, in part, to your requests. The following is the disposition for each of the state's waiver submissions.

Waiver 1: Subsequent Eligible Training Provider (ETP) Requirements; All student reporting requirement (WIA Sec. 122(d)(1)(A)(i) and 20 CFR 663.535(c)(1))

Based on the state's current request (copy enclosed), we are not approving the state's request to waive the "all student" reporting requirement for subsequent eligibility at WIA section 122(d)(1)(A)(i) and 20 CFR 663.535(c)(1) at this time. This particular requirement is subsumed in the broader policy determination with regard to the overall eligible training provider impediments to full implementation of the states' five–year strategic plans, as identified by the WIA Readiness Workgroups. Pending the national resolution of these issues, we are not prepared to waive such a critical component of the WIA key principles of increased accountability and customer choice. Although we are not now prepared to waive this particular provision, we do wish to assist the state in addressing the issue of declining eligible training providers, which directly impacts on customer choice in accessing training services, one of the key reform principles of WIA.

Accordingly, the state is granted a waiver of the 18-month requirement at 20 CFR 663.530 for subsequent eligibility through Program Year (PY) 2003, ending June 30, 2004. The waiver approval is contingent on the state providing a plan for developing a workable subsequent eligibility process, including a time line, for coming into compliance with the subsequent eligibility requirements at WIA section 122. The effect of this waiver is to extend the period of initial eligibility of providers through PY 2003 to enable the state to have the subsequent eligibility determination process completed in preparation for program operations in PY 2004, beginning July 1, 2004.

Waiver 2: Eligible Training Provider (ETP) Requirements; Local Identification of Eligible Training Providers (Sec. 122(e)(2) and (3), and 20 CFR 663.515(d))

The state is seeking to waive the need for the designated state agency, the agency responsible for section 122 requirements, to double-check the review by the local agencies of the performance levels of providers on the list provided to the state. Specifically, at WIA section 122(e)(2), waive "If the agency determines, within 30 days after the date of the submission, that the provider does not meet the performance levels described in subsection (c)(6) for the program (where applicable), the agency may remove the provider from the list for the program. The agency may not remove from the list an agency submitting an application under subsection (b)(1)." Also, at Section 122 (e)(3), waive "and is not removed by the designated State agency under paragraph (2)." The state's request appears to meet the standard for waiver of requirements relating to key reform principles, as specified at 20 CFR 661.410(c).

Under the current state requirements, the Local Workforce Investment Boards solicit, review, and approve training providers' applications for WIA eligibility. Then, the information is transmitted to the state Department of Labor and Industrial Relations (DLIR) for it to determine if the training provider meets the performance levels. The state indicates that from its experience, the state's review is duplicative and only serves to delay the approval process.

The state indicates that it has worked to address the barrier by opting to support consumer protection by proactively assisting the state Department of Education (DOE) to get trade, vocational, and technical schools licensed. This state requirement has languished for a number of years, but the active partnership of the state DLIR and the local Workforce Investment Boards with the state DOE will assure that instructors are qualified, the curriculum is appropriate, the school is insured, and tuition would be reimbursed if the school shut down. When the state DOE licensing process is caught up, DLIR and the local Workforce Investment Boards will be able to re-examine the need for formal contracts for quality control, thus speeding up the eligibility process.

At this time, we are deferring action on the request. The request raises policy issues regarding strategic planning guidance and plan modification issues for the state, which have potentially broad policy implications system-wide and require further review. Therefore, we propose to deal with these requests separately. Our San Francisco Regional Office has been in contact with state staff to discuss the issues involved and we understand that the state is willing to accept the partial resolution of its first request, while we resolve the issues on the state's second waiver request. Accordingly, we have approved a waiver to extend the period of initial provider eligibility now, as outlined in Waiver 1 above, and we will address the verification of local-level provider performance information under separate cover when a decision has been reached.

The granted waiver is incorporated by reference into the state's WIA Grant Agreement, as provided for under paragraph 3 of the executed Agreement, and also constitutes a modification of Hawaii's approved five-year Strategic Plan. A letter is being sent to your WIA state liaison, which supplements this notification letter and spells out the terms and conditions that apply to the granted waivers. A copy of each letter should be filed with the state's WIA Grant Agreement and the state's approved five-year Plan, as appropriate.

We look forward to enabling you to achieve better workforce development outcomes and improve the lives of many Hawaii residents. We are prepared to entertain other state and local-level waiver requests that Hawaii may wish to submit, consistent with the provisions of the Act and regulations.

Sincerely,

Emily Stover DeRocco
Assistant Secretary

Enclosure

BENJAMIN J. CAYETANO
GOVERNOR

LEONARD AGOR
DIRECTOR

AUDREY E. HIDANO
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
830 PUNCHBOWL STREET
HONOLULU, HAWAII 96813

November 20, 2001

Armando Quiroz
Regional Administrator
U.S. Department of Labor
Employment and Training Administration
P.O. Box 192767
San Francisco, CA 94119-3767

Dear Mr. Quiroz:

Enclosed is Hawaii's Waiver Request for 2001-2004. If there are questions, please have your staff contact Dorothy Bremner, staff to the Workforce Development Council, or Carol Kanayama, Program Officer for the Workforce Development Division. Their contact numbers are:

Dorothy Bremner	Ph. 808-586-8673 dorothy-bremner@hawaii.rr.com
Carol Kanayama	Ph. 808-586-8825 ckanayama@dlir.state.hi.us

Thank you for your consideration of this request.

Very truly yours,

Leonard Agor
Director

Enclosure

STATE OF HAWAII

Workforce Investment Act Waiver Requests
For Program Years 2001-2004

Overview

Principles

Among Hawaii's principles for the Workforce Investment Act are:

- Maintenance and support of a sizeable list of eligible training providers so that customers will truly have a choice of trainers; and

- Development of a seamless, integrated workforce development system with timely response to customers' and employers' needs.

Two Waiver Requests

To support the two principles above, Hawaii seeks waivers of two sections of the Workforce Investment Act of 1998 (WIA).

1. Waive the requirement for performance information on all individuals (both non-WIA and WIA) participating in a provider's program. Specifically, waive Section 122(d)(1)(A)(i).

2. Waive the need for the State agency to double-check the review by the local agencies. Specifically, waive parts of Section 122(e)(2) and (3).

We see the waivers as an interim measure, and we are working with our Congressional delegation to repeal these portions of WIA.

Section 122(d)(1)(A)(i)

Waiver Request

Waive the requirement for performance information on all individuals (both non-WIA and WIA) participating in a provider's program. Specifically, waive Section 122(d)(1)(A)(i).

The Problem

Hawaii's barriers to providing an adequate number of training programs for true consumer choice as intended by WIA Section 122 center on the performance data required for all (both non-WIA and WIA) participants. Specifically:

1. Training providers often have little or no incentive for continuing as training providers. Some may receive few, if any, Individual Training Account (ITA) referrals. For others, data collection is so time-consuming and costly that they prefer to spend their energies cultivating other customers.

2. Consumer choice is severely limited when the non-credit arms of many community colleges are unwilling to seek subsequent eligibility in the face of the data collection burden. This will be especially problematical, because those non-credit programs are often the most appropriate ones for WIA customers. For example, Maui Community College's non-credit arm has been especially active and supportive of WIA, but it cannot and will not afford to collect data for those courses where there are no ITA referrals.

3. By relying on the Unemployment Insurance wage records, the performance data lacks significant meaning and is "old" by the time it is assembled. The attached chart depicts Hawaii's Unemployment Insurance data lag.

4. And, it has to be said, this performance data is not that useful to WIA customers in choosing a training program. It would require a well-trained person to interpret the performance data and understand the data definitions and limits. "Choice" suggests freedom to define what is important to you; e.g., did my friend recommend that training provider? Does the training schedule fit in with my work hours? Has my favorite instructor just been hired by training provider X? Yes, that means the freedom to choose the school that begins with "A" because it shortens the search, or to choose the one with the most attractive model advertising the school's wares.

These barriers are basic flaws in the Act and stand in the way of consumer choice as well as every state's immediate operational need to have a workable Subsequent Eligibility policy in place as of January 1, 2002.

What Hawaii has Done to Address the Barriers

There are no state or local statutory or regulatory barriers to consumer choice.

Prior to the enactment of WIA, Hawaii already had in place an excellent system of comprehensive information to enhance the consumer's ability to choose suitable training. We call this system "Career Kokua" (Career Help). In implementing WIA, we have spent a portion of the 15% funds and considerable time to modify Career Kokua, using it as the platform for building the Consumer Report Card System. Using some 15% WIA funds, Career Kokua has also assisted the training providers to produce the performance data. Career Kokua matches provider-supplied seed data against the Unemployment Insurance wage records.

Hawaii follows a one-year cycle for the application period, receipt of seed data from the training providers, performance calculation, and determination of eligibility. Because we

have attempted to display the performance data from comparable time periods for all training providers, there can never be available data at the end of one year for initially eligible providers. We therefore extended the initial eligibility period for all providers to two years, as allowed by WIA Reg. 663.530 when sufficient performance data cannot be collected in a shorter time.

Expected Programmatic Impact of Waiver

Hawaii expects to maintain consumer choice by retaining the currently eligible training programs. Hawaii also expects to improve the State's WIA performance in the credential measure so that it meets the negotiated level.

Expected Impact on Individuals

WIA customers will benefit, because they will have a wider choice of training programs than they would if training providers voluntarily dropped off the list.

Monitoring the Waiver's Implementation

Nov. 2001 Start active recruitment, to retain and add providers.

Nov. 2001 Troubleshoot methods for counting credentials. Disseminate.

By Jan. 2002 The state work group on Eligible Training Providers is currently amending Hawaii's Manual on Training Provider Procedures. We will lighten the burden for Subsequent Eligibility by adopting some practices from other states.[1]

1. We will consider reducing the number of programs to track by defining a training program as being at least 41-61 hours. We previously had no minimum number of hours to qualify as a training program. This step would decrease the number of programs for which data must be collected, making it more attractive for training providers to seek eligibility.

2. We will waive performance standards when there are fewer than five WIA participants in a program. Although it will allow us to keep programs that don't currently have WIA participants, without the waiver, it does not solve the overwhelming data collection problem that all providers face.

3. We will reduce the number of performance measures that a provider has to meet in order to qualify for Subsequent Eligibility. More

[1] We learned about some of these strategies from the Preliminary Draft *TA Guide: Addressing Subsequent Eligibility Implementation Issues*, by the WIA Readiness ETPL Work Group, October 23, 2001. Although the draft is not released, these practices appear to be in effect in some states.

providers would "pass" this less stringent test. This also allows us to remove the retention rate of WIA participants, a measure that is not a reasonable reflection on the quality of training because it is diluted by too many factors other than the training provider. We had not realized that WIA does not require us to evaluate all seven measures for which data must be collected.

4. We are refining the Consumer Report Card System program to be sure that it removes from the denominator those students who were already employed and/or are continuing in school and therefore do not seek employment.

June-Nov. 2002 The work group will consider the benefits and costs to collect supplemental data, to determine the feasibility of providing better information to consumers so they may effectively assess the quality of training by each provider.

Comments Process - See page 6

Section 122(e)(2) and (3)

Waiver Request

Waive the need for the State agency to double-check the review by the local agencies. Specifically, at Section 122(e)(2), waive "If the agency determines, within 30 days after the date of the submission, that the provider does not meet the performance levels described in subsection (c)(6) for the program (where applicable), the agency may remove the provider from the list for the program. The agency may not remove from the list an agency submitting an application under subsection (b)(1)." Also, at Section 122 (e)(3), waive "and is not removed by the designated State agency under paragraph (2),".

The Problem

The Local Workforce Investment Boards solicit, review, and approve training providers' applications for WIA eligibility. Then, the information is transmitted to the State DLIR for it to determine if the training provider meets the performance levels. From our experience, the state's review is duplicative and only serves to delay the approval process. Quality control can be achieved through other methods. Again, we see this as a flaw in the Act.

What Hawaii has Done to Address the Barrier

Hawaii has opted to support consumer protection by proactively assisting the State Department of Education (DOE) to get trade, vocational, and technical schools licensed. This state requirement has languished for a number of years, but the active partnership of the State Department of Labor and Industrial Relations (DLIR) and the local Workforce Investment Boards with the State DOE will assure that instructors are qualified, the curriculum is appropriate, the school is insured, and tuition would be reimbursed if the school shut down. When the State DOE licensing process is caught up, DLIR and the local Workforce Investment Boards will be able to re-examine the need for formal contracts for quality control, thus speeding up the eligibility process.

The Oahu Workforce Investment Board obtained a waiver from its county procurement code so it can use a sole source procurement. (being checked)

Expected Programmatic Impact of Waiver

Hawaii expects to improve the State's WIA performance in the credential measure so that it meets the negotiated level.

Expected Impact on Individuals

WIA customers will benefit, because the consumer protection from previously unlicensed programs will be in place. In addition, the time to qualify an eligible training program will be shortened.

Monitoring the Waiver's Implementation

Nov 2001-Jan. 2002	During the next solicitation for both initial and subsequent eligibility, the local Workforce Investment Boards will publicize the State DOE license requirement, include the State DOE license application with the Eligible Training Provider solicitation, and communicate to the State DOE the names of those schools that have not obtained their required licenses.
Start Nov. 2001	The State Department of Labor & Industrial Relations has budgeted funds and will verify the accuracy of the information about training providers on the State list. DLIR will have more resources for this verification when it is no longer responsible for double-checking the work of the local Workforce Investment Boards.

Comments Process (for both Waiver Requests)

"Comment" is an understatement. Support for these waiver requests has grown into a roar.

The statewide work group on Eligible Training Providers, which consists of representatives of community colleges, private training providers, counties, and the State Department of Labor and Industrial Relations (DLIR), started its second review of the Eligible Training Providers procedures in August 2001. The work group plans to complete its work by mid-December 2001.

The work group decided to make its concerns about implementing Section 122 of WIA known to Region VI representatives of the U.S. Department of Labor (USDOL) at the USDOL Focus Group held on October 4, 2001 in Honolulu. Business and labor representatives from the local Workforce Investment Boards and the Workforce Development Council fully participated in the focus group, whose recommendations included:

- Revamp the eligible training provider system.
- Allow local areas to substitute their own criteria to select eligible training providers.
- Eliminate the state's review of decisions by the local areas.
- Seek waivers in order to simplify the eligible training providers procedure.

Encouraged by the "can do" attitude of the USDOL representatives, the work group decided to seek these waivers.

In early October, several local Workforce Investment Boards, the State Department of Labor and Industrial Relations (DLIR), and the State Workforce Development Council wrote Hawaii's Congressional delegation, asking for amendments to WIA that, among other things, would allow simpler eligible training providers procedures. The Workforce Development Council, at its October 13, 2001 meeting, expressed support for these efforts to re-think strategy in the face of changed and needier post-September 11th times. Of course, the makeup of the local Workforce Investment Boards and the State Workforce Development Council is broadly representative of the community and includes active business and labor members.

Federal Register

Friday,
August 11, 2000

Part II

Department of Labor

Employment and Training Administration

20 CFR Part 652 et al.
Workforce Investment Act; Final Rules

High quality information can aid customers in making informed judgments and steering clear of questionable programs or providers. We encourage Local Boards to make recommendations on the types of information to be collected as part of the Governor's procedures for initial eligibility for non-HEA, non-NAA programs and providers and to ensure that their own applications for HEA and NAA programs and providers solicit the needed types of information and to obtain appropriate information to determine subsequent eligibility. Extensive supplementary information on providers and programs can also be included on the local list under § 663.575 and Local Boards and case managers can present additional information during the decision-making process, or encourage WIA customers themselves to acquire additional information on programs and providers under consideration. Local Boards can also coordinate with one another on the types of information required in initial applications and in supplementary information, to assure that there are high levels of information on programs in all local areas.

• *Providing quality guidance and continuing case management.* Individuals eligible for training services select a program after consultation with a case manager. States and Local Boards can take steps to ensure that case managers: encourage individuals to fully utilize the information available in the local or State list and in the consumer reports; provide additional information beyond the lists and consumer reports; assist individuals in doing their own research on programs or providers; and help individuals identify specific options and systematically compare them. If an individual does chose a questionable program, case managers can monitor the individual's progress and the training program's performance, in order to identify and take action to avoid potential problems.

• *Creating procedures to assure high performance.* State and Local Boards can create procedures to hold questionable providers accountable for performance. For example, procedures could permit ITA's to be paid incrementally upon completion of specific milestones.

Because the Act encourages broad customer choice, we do not think it appropriate to change the regulations. State and Local Boards have the flexibility to help individuals to make the best choice for their circumstances.

A commenter wanted § 663.510 to ensure that Local Boards have the flexibility to set policy on providers and programs that reflects local conditions and that the State cannot add its own providers to the State list.

Response: WIA section 122(e)(2) makes it clear that, in compiling the State list, the State has authority to include only providers and programs submitted as part of local lists. The State has no authority to include additional providers and programs. However, Local Boards have only limited authority to determine which programs or providers are included or excluded from the local list. Rather, the Local Board must, for initial eligibility, include all HEA and NAA programs and providers for which complete applications are submitted and include non-HEA and non-NAA programs which meet the Governor's criteria, which are not required to, but may, permit adjustments to performance levels for local conditions. For subsequent eligibility, all programs must meet minimum acceptable performance levels specified in the Governor's procedures and adjusted according to the Governor's procedures for local factors and the characteristics of the population served by the providers. Local Boards have the flexibility to require higher, but not lower, levels of performance. We encourage Local Boards to actively participate in the development of the procedures for determining initial and subsequent eligibility.

We recognize that, during both initial and subsequent eligibility, there may be programs which a Local Board believes are valuable in meeting local workforce needs that do not meet performance levels (or other criteria) and, therefore, cannot be included on the local list. To avoid this situation, we encourage local Boards to make their recommendations on the Governor's initial eligibility procedures, an opportunity which Governors are required to make available to Local Boards under § 663.515(c)(1)(I). As discussed earlier, in order to ensure access to a broad array of programs that can meet customer's diverse skill needs, career interests, and preferences, we also encourage Local Boards, to provide outreach and technical assistance to providers.

We recognize that, in other instances, a Local Board may reluctantly have to include programs or providers which it believes are questionable on the local list. To avoid individuals selecting questionable programs or providers or to prevent any problems if they are selected, we encourage Local Boards to explore the approaches suggested above, for enhancing the quality of information, providing high quality case management and guidance, and creating procedures to enhance performance. Since the regulation accurately reflects the statutory requirements, no change has been made to the Final rule.

One commenter was concerned that the Preamble and § 663.510(b) were inconsistent in discussing the need for setting performance levels for initial eligibility.

Response: It was unclear what the commenter found inconsistent. The Governor determines the initial eligibility procedures, including appropriate of levels of performance, for non-HEA and non-NAA programs and sets minimum acceptable levels for all programs for subsequent eligibility (though such levels can be increased by the Local Board). These provisions are included in §§ 663.515 and 663.535.

Another commenter stated that the process for determining eligible providers, as described in § 663.510, should be as transparent as possible, and allow qualified providers to become eligible while setting sufficient thresholds to limit participation of unqualified providers.

Response: We believe that the Act and regulations provide States and Local Boards with the opportunity to set up systems that will be transparent and achieve the goals suggested by the commenter. No change has been made to the Final rule.

Some commenters questioned whether §§ 663.510(c)(2) and 663.515(d) give too much authority to designated State agency by authorizing it to *verify* performance information on providers' programs submitted by the Local Board. One commenter felt that the regulations exceed the language of the Act, which only requires that the State determine if performance levels are met. Another commenter suggested that the regulations should not shift this responsibility onto States and that, if States have this responsibility, we should provide support and technical assistance in carrying out verification. The commenter also suggested that the Act appears to require a duplicative function by Local Boards and the designated State agency in determining if performance levels are met.

Response: We agree that the Act, in section 122(e)(2), specifies that the State *determines* if performance levels are met for programs submitted on local lists. However, we believe that the role of the State agency in verifying performance information is implicit in the statutory scheme, based on the State agency's authority to enforce provisions of section 122(f)(1) on the intentional submission of inaccurate performance information (which can only be determined as inaccurate if there is a

way to verify the information submitted) and on the requirement that providers submit *verifiable* program-specific information. We have changed the language in § 663.510(c)(2) to clarify that the State agency must determine if programs meet performance levels, and, in so doing, may verify the accuracy the performance information submitted. We have also revised § 663.515(d) to clarify that the designated State agency determines if the performance levels are met for programs Local Boards submit as part of their local list. In addition, since State agency consultation with the Local Board is required under section 122(f)(1) and verifiable information is required to be submitted to the Local Board, we believe that the Act also provides implicit authority to Local Boards to verify performance information and to report suspected inaccuracies to the State agency. We have added language in a new paragraph 663.510(e)(4) to clarify that Local Boards may perform verification of performance information, under the Governor's procedures. Technical assistance on verification and other aspects of implementing WIA section 122 is being planned.

We agree that the roles of the State agency and Local Boards may overlap in determining if programs meet performance levels and in verifying performance information, and we encourage States and Local Boards to work toward eliminating needless duplication. The Act does not, however, authorize the State to review Local Boards' determinations of programs that do not meet the performance levels and are, therefore, neither included on local lists nor forwarded to the State. No change has been made to this aspect of the Final rule.

Section 663.515—Initial Eligibility Process—One commenter suggested that initial eligibility criteria for institutions offering degree programs be accreditation or approval by the appropriate authority and, for institutions that offer certificate programs, appropriate licensing by the State.

Response: In determining initial eligibility, Local Boards have the option to request information about accreditation and approval from HEA-eligible and NAA-registered programs and providers as part of the application and to include such information on the local list. However, we do not believe that Act provides authority for *any* approval criteria for HEA and NAA programs and their providers, as long as completed applications are submitted and the program or provider meets the eligibility criteria of WIA section 122(a)(2)(A) and (B). We note that to be eligible under HEA title IV, providers must be accredited, and, if a public institution, approved by appropriate State authorities. For non-HEA and non-NAA programs and their providers, the Governor's procedures could require that State licensing, or any other applicable criteria, be used for both approval or information purposes. No change has been made to the Final rule.

We encourage State WIA systems to work with State public education, and licensing authorities to harmonize, coordinate, or strengthen requirements for all types of programs and providers, since the strictness and consistency of approval, licensing and accreditation for providers and programs varies widely between—and even within—States. Similarly, requirements for certificate programs, offered at both HEA-eligible and non-HEA-eligible providers, vary widely in terms of length, content, and rigor.

Another commenter asked that §§ 663.515 and 663.535 require the Governor to allow sufficient time for labor organizations and businesses to provide comments on initial and subsequent eligibility procedures and suggested a minimum of 30 days. The commenter also wanted the regulations to require that State and local labor federations be part of the consultation process.

Response: We view the comment and consultation provisions in this section, as throughout the Act, as cornerstones of the new system envisioned in the Act. To assure there is adequate time for comments, while permitting as much State flexibility as possible, we have added language at §§ 663.515(c)(1)(iii) and 663.535(a)(3) to require Governors to establish and adhere to a specific time period for the consultation and comment process during the development of procedures for initial and subsequent eligibility. We strongly encourage Governors to take affirmative steps to include State and local labor federations in the comment and consultation process, but we do not think additional changes to the Final rule are warranted. Under the rule as written, Governors are required to solicit and take into consideration the recommendations of providers of training services, which may, in some areas, include labor federations involved in providing apprenticeship or other training, and must provide an opportunity for representatives of labor organizations to submit comments on the procedures.

A commenter suggested that Governor's procedures for initial eligibility require evidence that training providers have consulted with labor organizations who represent workers having the skills in which training is proposed.

Response: While such an activity may be desirable, the Act does not provide authority to require Governors to include such a provision in their initial eligibility procedures. The contents of applications for initial and subsequent approval are left to the Governor's discretion, after appropriate consultation. We encourage Governors to consider such consultation requirements for initial eligibility, in order to assure that programs are of high-quality and match current skill requirements. We also encourage both Governors and Local Boards to consider including information items in initial eligibility procedures and applications that will help consumers identify if programs have been subject to review and approval by appropriate labor and industry organizations. No change has been made to the Final rule.

One commenter was concerned that the 30 days, permitted in section 122(e) of the Act, for the State agency to determine if programs submitted by Local Boards meet the performance criteria for initial and subsequent eligibility, was insufficient. The commenter recommended that State agencies be given 90 days.

Response: We recognize that until State data collection and records linkages systems are in place, States will have difficulty in meeting the timing requirement for verifying information and for determining if performance levels are met. Since the law specifies that the State agency has only 30 days, the State may not be able to determine if such levels are met on all programs' performance and the State may have to develop a prioritizing or sampling system. However, we also recognize that in a number of circumstances, timing problems will persist even once such data systems are in place, since there are time lags in accessing UI quarterly records for verifying program performance information. We have added language in § 663.530 to provide that, in the limited circumstance when insufficient data is available, initial eligibility may be extended for a period of up to six additional months, if the Governor's procedures provide for such an extension.

A number of commenters expressed suspicion that initial eligibility procedures, by providing complete discretion to Governors and Local Boards, would result in programs being determined eligible on the basis of arbitrary performance and cost thresholds, and thus lead to "creaming"

(c) An individual who has been determined eligible for training services under § 663.310 may select a provider described in paragraph (b) of this section after consultation with a case manager. Unless the program has exhausted training funds for the program year, the operator must refer the individual to the selected provider, and establish an ITA for the individual to pay for training. For purposes of this paragraph, a referral may be carried out by providing a voucher or certificate to the individual to obtain the training.

(d) The cost of referral of an individual with an ITA to a training provider is paid by the applicable adult or dislocated worker program under title I of WIA.

Subpart E—Eligible Training Providers

§ 663.500 What is the purpose of this subpart?

The workforce investment system established under WIA emphasizes informed customer choice, system performance, and continuous improvement. The eligible provider process is part of the strategy for achieving these goals. Local Boards, in partnership with the State, identify training providers and programs whose performance qualifies them to receive WIA funds to train adults and dislocated workers. In order to maximize customer choice and assure that all significant population groups are served, States and local areas should administer the eligible provider process in a manner to assure that significant numbers of competent providers, offering a wide variety of training programs and occupational choices, are available to customers. After receiving core and intensive services and in consultation with case managers, eligible participants who need training use the list of these eligible providers to make an informed choice. The ability of providers to successfully perform, the procedures State and Local Boards use to establish eligibility, and the degree to which information, including performance information, on those providers is made available to customers eligible for training services, are key factors affecting the successful implementation of the Statewide workforce investment system. This subpart describes the process for determining eligible training providers.

§ 663.505 What are eligible providers of training services?

(a) Eligible providers of training services are described in WIA section 122. They are those entities eligible to receive WIA title I–B funds to provide training services to eligible adult and dislocated worker customers.

(b) In order to provide training services under WIA title I–B, a provider must meet the requirements of this subpart and WIA section 122.

(1) These requirements apply to the use of WIA title I adult and dislocated worker funds to provide training:

(i) To individuals using ITA's to access training through the eligible provider list; and

(ii) To individuals for training provided through the exceptions to ITA's described at § 663.430 (a)(2) and (a)(3).

(2) These requirements apply to all organizations providing training to adult and dislocated workers, including:

(i) Postsecondary educational institutions providing a program described in WIA section 122(a)(2)(A)(ii);

(ii) Entities that carry out programs under the National Apprenticeship Act (29 U.S.C. 50 *et seq.*);

(iii) Other public or private providers of a program of training services described in WIA section 122(a)(2)(C);

(iv) Local Boards, if they meet the conditions of WIA section 117(f)(1); and

(v) Community-based organizations and other private organizations providing training under § 663.430.

(c) Provider eligibility procedures must be established by the Governor, as required by this subpart. Different procedures are described in WIA for determinations of "initial" and "subsequent" eligibility. Because the processes are different, they are discussed separately.

§ 663.508 What is a "program of training services"?

A program of training services is one or more courses or classes, or a structured regimen, that upon successful completion, leads to:

(a) A certificate, an associate degree, baccalaureate degree, or

(b) The skills or competencies needed for a specific job or jobs, an occupation, occupational group, or generally, for many types of jobs or occupations, as recognized by employers and determined prior to training.

§ 663.510 Who is responsible for managing the eligible provider process?

(a) The State and the Local Boards each have responsibilities for managing the eligible provider process.

(b) The Governor must establish eligibility criteria for certain providers to become initially eligible and must set minimum levels of performance for all providers to remain subsequently eligible.

(c) The Governor must designate a State agency (called the "designated State agency") to assist in carrying out WIA section 122. The designated State agency is responsible for:

(1) Developing and maintaining the State list of eligible providers and programs, which is comprised of lists submitted by Local Boards;

(2) Determining if programs meet performance levels, including verifying the accuracy of the information on the State list in consultation with the Local Boards, removing programs that do not meet program performance levels, and taking appropriate enforcement actions, against providers in the case of the intentional provision of inaccurate information, as described in WIA section 122(f)(1), and in the case of a substantial violation of the requirements of WIA, as described in WIA section 122(f)(2);

(3) Disseminating the State list, accompanied by performance and cost information relating to each provider, to One-Stop operators throughout the State.

(d) The Local Board must:

(1) Accept applications for initial eligibility from certain postsecondary institutions and entities providing apprenticeship training;

(2) Carry out procedures prescribed by the Governor to assist in determining the initial eligibility of other providers;

(3) Carry out procedures prescribed by the Governor to assist in determining the subsequent eligibility of all providers;

(4) Compile a local list of eligible providers, collect the performance and cost information and any other required information relating to providers;

(5) Submit the local list and information to the designated State agency;

(6) Ensure the dissemination and appropriate use of the State list through the local One-Stop system;

(7) Consult with the designated State agency in cases where termination of an eligible provider is contemplated because inaccurate information has been provided; and

(8) Work with the designated State agency in cases where the termination of an eligible provider is contemplated because of violations of the Act.

(e) The Local Board may:

(1) Make recommendations to the Governor on the procedures to be used in determining initial eligibility of certain providers;

(2) Increase the levels of performance required by the State for local providers to maintain subsequent eligibility;

(3) Require additional verifiable program-specific information from local

providers to maintain subsequent eligibility.

§ 663.515 What is the process for initial determination of provider eligibility?

(a) To be eligible to receive adult or dislocated worker training funds under title I of WIA, all providers must submit applications to the Local Boards in the areas in which they wish to provide services. The application must describe each program of training services to be offered.

(b) For programs eligible under title IV of the Higher Education Act and apprenticeship programs registered under the National Apprenticeship Act (NAA), and the providers or such programs, Local Boards determine the procedures to use in making an application. The procedures established by the Local Board must specify the timing, manner, and contents of the required application.

(c) For programs not eligible under title IV of the HEA or registered under the NAA, and for providers not eligible under title IV of the HEA or carrying out apprenticeship programs under NAA:

(1) The Governor must develop a procedure for use by Local Boards for determining the eligibility of other providers, after

(i) Soliciting and taking into consideration recommendations from Local Boards and providers of training services within the State;

(ii) Providing an opportunity for interested members of the public, including representatives of business and labor organizations, to submit comments on the procedure; and

(iii) Designating a specific time period for soliciting and considering the recommendations of Local Boards and provider, and for providing an opportunity for public comment.

(2) The procedure must be described in the State Plan.

(3)(i) The procedure must require that the provider must submit an application to the Local Board at such time and in such manner as may be required, which contains a description of the program of training services;

(ii) If the provider provides a program of training services on the date of application, the procedure must require that the application include an appropriate portion of the performance information and program cost information described in § 663.540, and that the program meet appropriate levels of performance;

(iii) If the provider does not provide a program of training services on that date, the procedure must require that the provider meet appropriate requirements specified in the procedure. (WIA sec. 122(b)(2)(D).)

(d) The Local Board must include providers that meet the requirements of paragraphs (b) and (c) of this section on a local list and submit the list to the designated State agency. The State agency has 30 days to determine that the provider or its programs do not meet the requirements relating to the providers under paragraph (c) of this section. After the agency determines that the provider and its programs meet(s) the criteria for initial eligibility, or 30 days have elapsed, whichever occurs first, the provider and its programs are initially eligible. The programs and providers submitted under paragraph (b) of this section are initially eligible without State agency review. (WIA sec. 122(e).)

§ 663.530 Is there a time limit on the period of initial eligibility for training providers?

Yes, under WIA section 122(c)(5), the Governor must require training providers to submit performance information and meet performance levels annually in order to remain eligible providers. States may require that these performance requirements be met one year from the date that initial eligibility was determined, or may require all eligible providers to submit performance information by the same date each year. If the latter approach is adopted, the Governor may exempt eligible providers whose determination of initial eligibility occurs within six months of the date of submissions. The effect of this requirement is that no training provider may have a period of initial eligibility that exceeds eighteen months. In the limited circumstance when insufficient data is available, initial eligibility may be extended for a period of up to six additional months, if the Governor's procedures provide for such an extension.

§ 663.535 What is the process for determining of the subsequent eligibility of a provider?

(a) The Governor must develop a procedure for the Local Board to use in determining the subsequent eligibility of all eligible training providers determined initially eligible under § 663.515 (b) and (c), after:

(1) Soliciting and taking into consideration recommendations from Local Boards and providers of training services within the State;

(2) Providing an opportunity for interested members of the public, including representatives of business and labor organizations, to submit comments on such procedure; and

(3) Designating a specific time period for soliciting and considering the recommendations of Local Boards and providers, and for providing an opportunity for public comment.

(b) The procedure must be described in the State Plan.

(c) The procedure must require that:

(1) Providers annually submit performance and cost information as described at WIA section 122(d)(1) and (2), for each program of training services for which the provider has been determined to be eligible, in a time and manner determined by the Local Board;

(2) Providers and programs annually meet minimum performance levels described at WIA section 122(c)(6), as demonstrated utilizing UI quarterly wage records where appropriate.

(d) The program's performance information must meet the minimum acceptable levels established under paragraph (c)(2) of this section to remain eligible;

(e) Local Boards may require higher levels of performance for local programs than the levels specified in the procedures established by the Governor. (WIA sec.122(c)(5) and (c)(6).)

(f) The State procedure must require Local Boards to take into consideration:

(1) The specific economic, geographic and demographic factors in the local areas in which providers seeking eligibility are located, and

(2) The characteristics of the populations served by programs seeking eligibility, including the demonstrated difficulties in serving these populations, where applicable.

(g) The Local Board retains those programs on the local list that meet the required performance levels and other elements of the State procedures and submits the list, accompanied by the performance and cost information, and any additional required information, to the designated State agency. If the designated State agency determines within 30 days from the receipt of the information that the program does not meet the performance levels established under paragraph (c)(2) of this section, the program may be removed from the list. A program retained on the local list and not removed by the designated State agency is considered an eligible program of training services.

§ 663.540 What kind of performance and cost information is required for determinations of subsequent eligibility?

(a) Eligible providers of training services must submit, at least annually, under procedures established by the Governor under § 663.535(c):

(1) Verifiable program-specific performance information, including:

(i) The information described in WIA section 122(d)(1)(A)(i) for all